No. 89-377

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL Union OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO, *and* COLIN DARLING,

Petitioners,

v.

LOWE EXCAVATING CO.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

GERARD C. SMETANA
Counsel of Record
ABRAMSON & FOX
One East Wacker Drive
Chicago, Illinois 60601
(312) 644-8500

MICHAEL E. AVAKIAN
CENTER ON NATIONAL LABOR POLICY, INC.
8001 Forbes Place, Suite 101B
North Springfield, VA 22151
(703) 321-9180

Attorneys for Respondent

QUESTION PRESENTED

Whether the court below correctly held in accordance with this Court's prior decision in *Linn v. United Plant Guard Workers, Local 114*, that the state tort of malicious defamation is not preempted by federal law.*

*Lowe Excavating Co. is a closely-held, non-public corporation.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT SECOND JUDICIAL CIRCUIT

The Respondent, Lowe Excavating Co. ("Lowe"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Illinois Appellate Court, Second Judicial District's decision, in this case.

COUNTERSTATEMENT OF THE CASE

The facts in this case are uncontested and the Appellate court's recitation is correct. Moreover, Respondent's Third Amended Complaint attached to Petitioners' brief at Appendix D, was verified by Marshall Lowe, the president of Lowe Excavating Company. All inferences are resolved to the benefit of the Respondent to demonstrate Petitioners' reckless action in disregard of the truth.

As set out therein, the Petitioners attempted to organize Lowe through the signing of a pre-hire agreement in the Fall of 1987. Having been unsuccessful in accomplishing this result, the union engaged in what it called "area standards" picketing of Lowe at the Canterbury Place federal housing project in McHenry County, Illinois on February 15, 1988. App. D. ¶12. As a result of the allegations of impropriety made by the union on its picket signs, other subcontractors' employees refused to cross the picket line. This resulted in the general contractor, FAMCO, removing Lowe from the project on February 17, 1988, because Petitioner Darling told FAMCO the pickets would not be removed until FAMCO complied. App. D. ¶13. Lowe had an eight year contract for excavating services on the project.

On February 17, 1988, Lowe filed its complaint for temporary restraining order, preliminary and permanent injunctive relief and for damages in state court. Lowe attached a copy of its certified payroll for the Canterbury Place job to the complaint. App. D ¶ 16. The next day, the union removed the case to the federal district court in Chicago, Illinois, alleging, among other things, that Lowe's complaint was preempted by federal law. The district court disagreed, "because Lowe's complaint does not on its

face contain a federal claim" and remanded the case back to state court. Local 150 did not appeal this ruling. A3.[1]

On March 22, 1988, Lowe's employees elected the Congress of Industrial Unions ("CIU") as their bargaining representative. On March 30, 1988, the Board certified the CIU as the collective bargaining agent for these employees. Local 150 chose not to participate in the election. App. D ¶ 21.

On August 15, 1988, Lowe entered into a collective-bargaining agreement with the CIU which required payment of wages and benefits greater than prevailing in McHenry County, and made retroactive to April 15, 1988. App. D ¶ 23. A copy of that contract was provided Local 150 as an exhibit to Lowe's Second Amended Complaint. In addition, Lowe provided Local 150 an independent auditor's comparison of Lowe's wages and benefits with Local 150's union contract. The report concluded that Lowe's wages and benefits were higher than Local 150. App. D ¶ 27.

On August 11, 1988, the Circuit Court heard Respondent's motion for preliminary injunctive relief and Petitioners' motion to dismiss. The Circuit Court granted Petitioners' motion to dismiss, without prejudice, and authorized Respondent to amend its complaint.

On September 27, 1988, Local 150 renewed its picketing of Lowe at a different jobsite, using the same signs previously used in the Spring, and again stating Lowe

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[1]Concurrently, Lowe filed unfair labor practice charges with Region 13 of the National Labor Relations Board on February 17, 1988, alleging unlawful secondary activity by Local 150. The Region found reasonable cause to believe that Local 150 had violated the Act and the union agreed to settle the matter. The agreement did not restrain any false union statements.

did not pay "area standards." Local 150 told Robert Zolle, a construction superintendent for the general contractor Erdman Construction Co. on the Woman's Health Care Center project in Crystal Lake, Illinois, that Lowe was "non-union." App. D ¶29. Erdman removed Lowe from the Job. App. D ¶32. Local 150 also renewed picketing of Lowe at the Canterbury Place project on September 29, 1988.

Lowe filed a verified Third Amended Complaint for Temporary Restraining Order, Preliminary and Permanent Injunction and for Damages in state court on September 29, 1988, C-177, and a motion for TRO, preliminary injunction and reconsideration of dismissal of the Second Amended Complaint on the basis of preemption. C-193. This complaint resulted in the filing of another motion to dismiss by the appellees. C-204.

The trial court initially granted Lowe's motion for a temporary restraining order on October 11, 1988, prohibiting the appellees from "picketing or otherwise disseminating the fact that Lowe is non-union." C-210. Simultaneously, the trial court denied "Respondent's request for preliminary injunctive relief from alleged picketing, with knowingly false placards relating to area standards, in reckless disregard for the truth is denied, based on federal preemption grounds." *Id.*

Lowe appealed and the Illinois Appellate Court reversed. Petitioners filed a request with the Illinois Supreme Court for leave to appeal, but the request was denied on June 1, 1989.

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Decision Below Raises No Issues Worthy of Review

The Petitioners allege that the decision below is in conflict with decisions of this Court. Although the matter represents an important issue in the law, careful review of the cases cited as in conflict were discussed at length by the court below. The decision of the Illinois Appellate Court plainly considered and relied upon this Court's decisions in *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236 (1959); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966); and *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290 (1977). The decision below does not create or sustain a conflict in the circuits or in any state court.

What is absent from the Petition is the recognition that the Illinois Appellate Court only determined that the tort of malicious defamation is not preempted by federal law based on the fact the union knew of Lowe's wage rates from service upon it of the CIU contract and auditor's report. The Petitioners demonstrated no cases to the court below that the Board would find actionable union defamation under §8(b)(4)(ii), 29 U.S.C. §158(b)(4)(ii). Nothing in the statute makes it an unfair labor practice for a union to engage in defamatory activities with actual knowledge or in reckless disregard of the truth or that those activities independently are coercive actions proscribed by the Act. The provisos to §8(b) only

presume that the truth will be published, but provides no remedy when it is not.[2]

In fact, the Illinois Appellate Court carefully considered each of the Petitioners' arguments since it recognized the federal concern raised by the union and agreed that "the activity in question is 'arguably protected' by the Act." A7. It found, however, that Illinois has an important interest to protect its citizens from malicious defamation and to redress victims of such conduct. A8. That finding alone was not of itself determinative for the appellate court. What was determinative to the Appellate Court, was this Court's ruling in *Linn* that "a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out in *Garmon*." *Linn*, 383 U.S. at 62; A9.

> Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences. The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice . . . [The Board] looks only to the coercive or misleading nature of the statements rather than their defamatory quality. The injury that the statement might cause to an individual's reputation - whether he be an employer or union official - has no relevance to the Board's function.

Id. at 63 (emphasis added).

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[2] 29 U.S.C. §158(b)(4)(i)(ii)(D), states in relevant part:
"Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public...."

29 U.S.C. §8(b)(7)(C), states in relevant part:
"Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public...."

Area standards picketing also does not in itself provide "umbrella" protection to the union. In *Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters*, 436 U.S. 180, 206 n.42 (1978), the Court shows that in contrast with organizational picketing, area standards picketing is a lesser right; the former "is at the very core of the purpose for which the NLRA was enacted. Area standards picketing, in contrast, has only recently been recognized as a §7 right." Whereas organizational picketing is linked to an employer's workers, "[a]rea standards picketing, on the other hand, has no such vital link to the employees located on the employer's property," *id.*, and therefore it was determined there was little risk to subject trespassory area standards picketing to state jurisdiction.

> While there does exist some risk that state courts will on occasion enjoin a trespass that the Board would have protected, the significance of this risk is minimized by the fact that in the cases in which the argument in favor of protection is the strongest, the union is likely to invoke the Board's jurisdiction and thereby avoid the state forum. Whatever risk of an erroneous state-court adjudication does exist is outweighed by the anomalous consequence of a rule which would deny the employer access to any forum in which to litigate either the trespass issue or the protection issue in those cases in which the disputed conduct is least likely to be protected by §7.

Sears, 436 U.S. at 206 (emphasis added).

The trap laid by Petitioners to lure the Court into is that somehow the Labor Board actually finds actionable issues relating to an "area standards doctrine." Pet. at 12. That is not the case here for two reasons.

First, the union initially picketed Lowe at a federally funded jobsite covered by the Davis Bacon Act, 40 U.S.C. §§276a-276a-5, for which the Secretary of Labor determined the wages and benefits prevailing in the

community that were required by law to be paid by all employers on the jobsite to their employees. Pursuant to the law, Lowe certified the payroll of its employees each week to the United States Department of Labor. Since Lowe was required as a minimum to pay the area standard rates determined by the Secretary of Labor to its employees, arithmetic has no part to play in this case. But, the union's allegation that Lowe was not paying area standards implicitly alleged ongoing criminal activity by Lowe, since Lowe was receiving reimbursement by the government contractor for paying the area standard wages and benefits to its workers. See Copeland Anti-Kickback Act, 18 U.S.C. §874; Anti-Kickback Act of 1986, 41 U.S.C. §54.

Second, the Petitioners acquiesced to any right to appeal the determination of the Board's regional directors that its picketing activities were unlawful or that Lowe's state court complaint for damages was an unfair labor practice. Each time the union agreed not to picket Lowe for secondary purposes, the next time Lowe had to show another independent unlawful object, and after each agreement, Petitioners continued to picket untruthfully. But, having been given the opportunity to make their case with the Board or through appeal of the federal district court's decision, the Petitioners cannot say now their actions were inherently lawful.[3] If either of these views of Petitioners' practices were incorrect, they could have

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[3]As the Regional Director of Region 33 of the Board found in his letter of December 1, 1988, the Petitioners had an unlawful recognitional intent "apart from any area standards object which the Union may or may not have had." Ex. to Appellant's Reply Brief.

appealed the findings, but chose instead to settle the two matters with the Board.[4]

Clearly, then, the Board did not find it to be its business to evaluate the truthfulness of the union's area standards publications independently of the Act's requirement that a coercive recognitional or secondary union object be present. If the truth was actionable independently by the Board, the Regional Director would not have noted that Lowe's labor costs were "higher" than Local 150's and treated that question only cumulatively for purposes of finding an unlawful recognitional object in Petitioners' picketing. Otherwise, both Regional Directors of the Board would have treated the truth as a separate unlawful activity and not a peripheral act as it did.

Moreover, the reason the truth is peripheral to the Labor Act is because the Board retains the burden to show a proscribed object under §8(b). None of the Petitioners' cited cases at 12-13 involve issues of untruthful or reckless picketing. In fact, the issue in those Board cases was whether area standards picketing by itself implicitly contains an unlawful "object" and therefore should be illegal per se. In *Local 107, Int'l Hod-Carriers (Texarkana Constr. Co.)*, 138 N.L.R.B. 102 (1962), two Board Members, Rogers and Leedom, dissented because the Board found area standards picketing not of itself to contain an unlawful object. Ten years later, in *Delivery*

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[4]Although the Board was obliged to reassert its March 1988 § 8(b) findings against the union again at this juncture, it provided no remedy or damages incurred by Lowe because of the untruthful picketing. *National Union of Hosp. Employees*, 345 N.L.R.B. 105 (1979); *Scott v. Moore*, 680 F.2d 979, 996 n.13 (Former 5th Cir. 1982) (en banc). "The Board can award no damages, impose no penalty, or give any other relief to the defamed individual," *Linn*, 383 U.S. at 63; *see also Bill Johnson's Restaurants, Inc.*, 290 N.L.R.B. No. 155, 129 L.R.R.M. 1105 (1988), discussed infra.

Drivers Local 296 (Alpha Beta Markets, Inc.), 205 N.L.R.B. 462 (1973), the Board specifically stated that whether or not area standards picketing should be illegal per se under the Act is best left to Congress.

Consequently, the Board will only find area standards picketing to be a pretext for organizational or secondary purposes where there is an admission or a violation of the Board's *Moore Drydock* standards. The mere fact of defamatory picketing does not substitute for the Board's burden of proof. And if Lowe's complaint here violated some union right, the union could have been expected to file its own unfair labor practice charge, which it did not.[5]

The Appellate Court correctly proceeded to hold that the Petitioner's argument that union untruths involving area standards are no different from the publication of other untruths. Petitioners provided "no authority to support the proposition that the specific content of the untruth is relevant to the *Linn* analysis." A9. The court below also made the correct determination that the matter at issue is not whether Lowe in fact "paid wages sufficient to meet area standards. The issue is whether defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard for the truth." A11.

> [The Board] looks only to the coercive or misleading nature of the statements rather than their defamatory quality. The injury that the statement might cause to an individual's reputation - whether he be an employer or union official - has no relevance to the Board's function. Cf. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 60 S.Ct. 561, 84 L.Ed. 738 (1940).

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[5] "[I]t may be expected that the injured party will request both administrative and judicial relief. The Board would not be ignored since its sanctions alone can adjust the equilibrium disturbed by an unfair labor practice." *Linn*, 383 U.S. at 66.

Id. at 63 (emphasis added).

There is nothing the state court could decide in this case that will upset the balance in the law since truthfulness does not directly concern the Board's supervisory mission. Even if the state court concludes the truthfulness question erroneously, *see Sears*, *supra*, since truth is only a collateral issue to finding an "object" required for intervention of the Board under §8, the balance will not be upset.[6]

These issues are plainly not ones to be entertained by the Board within its unfair labor practice jurisdiction. Respondent agrees with Petitioners that this case raises an important issue because the Board does not afford any remedy for untruthfulness. The reason the issue is important to Petitioners is because they view the Act as permitting picketing with impunity in order to pressure

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[6]Even if the trial court is required to consider the Board's "area standards doctrine" as the defendants allege, this is not an unacceptable risk of a prohibited inquiry, as explained in *Sears*, 436 U.S. at 188 n.13:

> The Court's rejection of an inflexible preemption approach is reflected in other situations as well. Where only a minor aspect of the controversy presented to the state court is arguably within the regulatory jurisdiction of the Labor Board, the Court has indicated that the Garmon rule should not be read to require pre-emption of state jurisdiction. *Hanna Mining Co. v. Marine Engineers*, 382 U.S. 181, 86 S. Ct. 327, 15 L.Ed.2d 254. The Court has also indicated that if the state court can ascertain the actual legal significance of particular conduct under federal law by reference to "compelling precedent applied to essentially undisputed facts," *San Diego Building Trades Council v. Garmon*, 359 U.S., at 246, 79 S. Ct., at 780, the court may properly do so and proceed to adjudicate the state cause of action. Permitting the state court to proceed under these circumstances deprives the litigant of the argument that the Board should reverse its position, or, perhaps, that precedent is not as compelling as one adversary contends.

non-signatory employers with the signal effect of causing work stoppages. Yet, in the present case, without specific evidence of an inquiry into the facts and acknowledgement the Petitioners were in possession of Lowe's collective-bargaining agreement, Petitioners untruthful picketing was held not preempted on its face and it must be actionable.

Although this case involves the decision of only one state court, if the Court agrees with the Respondent's analysis under the narrow circumstances raised here, the writ of certiorari should be denied. But, if the Court might believe that it is not self-evident that all defamatory activities, including picketing, are not in fact preempted, then the Court should grant the writ to demonstrate no exclusive federal jurisdiction exists in the circumstances and so affirm the holding below so that it can be applied to the benefit of other small contractors nationwide.

B. This Court's Prior Decisions Are Controlling

Like *Linn*, Lowe's defamation count lacks any substantial federal question for resolution. Lowe pled that the "placards were intentionally, materially, and recklessly false and misleading" or "in the exercise of reasonable diligence" the union should have known so. Complaint, ¶¶ 10, 11; A22.

In *Linn*, the Court also "conclude[d] that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him." 383 U.S. at 55. In that context, the Court noted that the Board does not police "propaganda used in elections," *id.* at 60, and by intentionally "circulating defamatory or insultory material known to be false...the one issuing such material forfeits his protection under the Act." *Id.* at 61 (citation omitted).

The state court in defamation actions will also not be injecting itself into the "merits of a labor controversy," *Linn*, 383 U.S. at 64, because redress of "defamation actions preserved in *Linn*...can be adjudged without regard to the merits of the underlying labor controversy." *Farmer*, 430 U.S. at 299-300. The Illinois Appellate Court's precise formulation coincides with this analysis, that "[t]he issue is whether defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard for the truth." A11. This is the same limitation set out in *Linn* to "guard[] against abuse of libel actions and unwarranted intrusion upon free discussion envisioned in the Act." 383 U.S. at 65.

The Board's amorphous "area-standards" doctrine and its purpose raised by Petitioners, is not in issue. "After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses." 383 U.S. at 63. Whether Petitioners had those procedures in place will surely assist the trial court in deciding whether Petitioners' actions might have been reckless.

These cases demonstrate the approach to preemption is not rigid under *Garmon*, but flexible. *Sears*, 436 U.S. at 188 n.13. Accordingly, there is no law to be reconciled by granting the writ.

C. The State Court Defamation Action is Unrelated to the Board's Remedies as Already Determined by the Board.

In *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 665 (1954), the Court explained, that "[t]o the extent that Congress prescribed preventive procedures against unfair labor practices, [this Court] recognized that

the Act excluded conflicting state procedure to the same end," but that where no congressional remedial scheme existed "there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated."

In *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957), the Court demonstrated that activity arguably within section 7 or 8 of the NLRA is preempted, but that "compelling state interests" were not overridden. In *Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters*, 436 U.S. 180 (1978), the Court applied the concept to uphold a state court injunction which precluded the union's tortious picketing activity. Although the Court thought the conduct "was arguably prohibited and arguably protected by federal law," it was permissible for the state court to restrain the location of the picketing. *Id.* at 198.

It is also clear that Lowe is not requesting as its remedy the cessation of all picketing by Petitioners. Only untruthful picketing does Lowe believe should be restrained in order to vindicate Lowe's interest in its reputation.

The National Labor Relations Board in *Bill Johnson's Restaurants, Inc.*, 290 N.L.R.B. No. 155, 129 L.R.R.M. (BNA) 1105 (1988), *on remand from*, *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), has unequivocally ruled that it will not consider and remedy state defamation claims because it does not have the expertise to evaluate state tort law or the extra resources to do so. 129 L.R.R.M. at 1108.

In that case, this Court had held that the preemption doctrine, citing *Sears*, *Linn*, and *Laburnum Constr. Corp.*, cannot bar the employer's "right to seek local judicial protection from tortious conduct during a labor dispute." 461 U.S. at 742.

> In *Linn v. Plant Guard Workers*, supra, at 65, we held that an employer can properly recover damages in a tort action arising out of a labor dispute if it can prove malice and actual injury. *See also Farmer v. Carpenters*, *supra*, at 306. If the Board is allowed to enjoin the prosecution of a well-grounded state lawsuit, it necessarily follows that any state plaintiff subject to such an injunction will be totally deprived of a remedy for an actual injury, since the "Board can award no damages, impose no penalty, or give any other relief" to the plaintiff. *Linn*, *supra*, at 63. Thus, to the extent the Board asserts the right to declare the filing of a meritorious suit to be a violation of the Act, it runs headlong into the basic rationale of *Linn*, *Farmer*, and other cases in which we declined to infer a congressional intent to ignore the substantial state interest "in protecting the health and well-being of its citizens." *Farmer*, *supra*, at 302-303. *See also Sears, Roebuck & Co. v. Carpenters*, *supra*, at 196; *Linn*, *supra*, at 61.

Id.

The Board in its decision on remand has openly proclaimed that it will refuse to hear the merits of any libel claim.

> We next address the General Counsel's alternative contention that as the state court has been precluded from deciding the merits of the libel claim, we should now do so . . . Nonetheless, we decline the General Counsel's invitation to enter that thicket. Our expertise lies in resolving labor law questions that arise under the Act, rather than deciding claims that arise under state law. Moreover, our limited resources do not permit us to engage in the resolution of state law claims.

129 L.R.R.M. (BNA) at 1108.

> Conversely, our decision not to decide these state law claims provides the parties in future cases with the necessary guidance to aid their resolution of those cases.

Id. at n.16 (emphasis added).

Accordingly, the National Labor Relations Board, like the federal court earlier in the case at bar, expressly stated it will not hear matters concerning libel arising out of state law or that it is required to "decide the state court suit." 129 L.R.R.M. at 1108 n.14. How the Board's "area standards doctrine" is adversely affected by the Board's expressly stated refusal to consider libel questions is not explained by Petitioners. Neither do they explain what interest of the Board will be vindicated by resolution of state torts, that is, what section of the Act is affected or arguably provides an unrestrained right to publish defamatory statements. Since none are present, no important labor law interests can be affected by granting the writ.

CONCLUSION

For the reasons set out above, the Court should deny Petitioners' request for a writ of certiorari to the Appellate Court of Illinois, Second Judicial District.

Respectfully submitted,

Gerard C. Smetana*
ABRAMSON & FOX
One East Wacker Drive
Chicago, Illinois 60601
(312) 644-8500

Michael E. Avakian
CENTER ON NATIONAL
LABOR POLICY, INC.
8001 Forbes Place, Suite 101B
North Springfield, VA 22151
(703) 321-9180

Attorneys for Respondent
*Counsel of Record

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